WALKUP, MELODIA, KELLY & ECHEVERRIA

FOCUS on torts

VOLUME VIII, NUMBER 1 Spring 1999

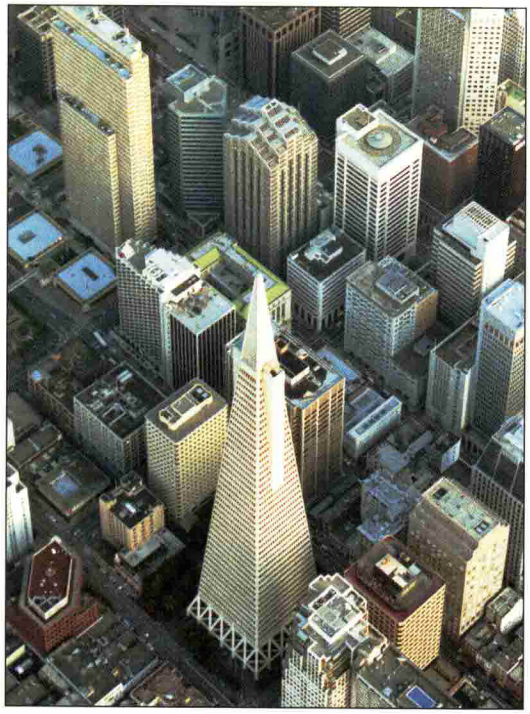
ATLA ANNUAL CONVENTION VISITS SAN FRANCISCO

The Association of Trial Lawyers of America is holding its annual convention July 17th through the 21st here in San Francisco. As a result, we expect that a number of our friends and associate counsel will be heading here come summer. As this issue of Focus goes to press, we are in the process of putting together an insiders' guide listing the best places to visit, dine and stay.

This year's ATLA convention will include National College of Advocacy demonstrations, lectures, panel discussions and technical exhibits showcasing the latest in advocacy aids. Our own Dan Dell'Osso, vice president of the ATLA product liability section, will be speaking on emerging issues in the field of product liability.

The keynote speaker for this year's convention is Morris Dees, co-founder of the Southern Poverty Law Center, and a tireless civil rights advocate.

Our friends and associate counsel visiting the Bay Area for the first time should drop us a note requesting our recommendations for the best restaurants, kids' activities, clubs, hiking trails and jogging loops. Our 25 favorite restaurants, including the best place to find authentic Italian food in North Beach, the hottest Szechuan in Chinatown, and the three most romantic restaurants in San Francisco, will be something all of our friends will want.



For the athletically inclined, Dan Kelly is compiling a list of his ten favorite public golf courses within a one hour drive of San Francisco, Dan Dell'Osso (who recently qualified for the Boston marathon) will give you his five favorite running routes through the streets of San Francisco, and our unidentified in-house wine snob has put together a list of the best undiscovered wineries in the Napa Valley. In addition, we are coordinating a party at Fisherman's Wharf for our friends and referring attorneys from around the country.

Don't forget to bring a sweater and a sweatshirt. July in San Francisco can be quite chilly. As the Central Valley heats up and the fog rolls in, July nights often seem like the middle of February, so be forewarned.

SUPREME COURT APPROVES RICO USE IN HMO CASE

A Nevada statute intended to prevent unfair claims practices (the McCarran-Ferguson Act) does not prohibit plaintiffs from suing for insurance fraud under the Federal Racketeer Influence and Corrupt Organizations Act according to the United States Supreme Court.

In Humana, Inc. v. Forsyth, et al., the Supreme Court held that because RICO advances the state's interest in combating insurance fraud, and does not frustrate any articulated state policy, the McCarran-Ferguson Act does not preempt a RICO action.

The Ninth Circuit had previously reached the same result, overturning a District Court grant of summary judgment in favor of Humana. In the underlying case, the plaintiffs claimed that they had been overcharged on their co-payments for hospital stays. In its master contract, Humana had agreed to pay 80% of the beneficiary's costs over their deductible, leaving the beneficiary responsible for the remaining 20%. However, because Humana had negoti-

Continued on page three

FIRM EARNS VALUESTAR CERTIFICATION

We are pleased to announce that we have been awarded the prestigious ValueStar certified symbol of customer satisfaction. This certification is the result of an independent survey conducted by the Public Research Institute at San Francisco State University, in accord with the ValueStar customer service qualification requirements.

ValueStar, a publicly traded, consumer-owned company, has a patented system for surveying customers of applicant companies. Only companies rated very good to outstanding are certified.

ValueStar began in the San Francisco Bay Area in 1992. To assure credibility of its surveys, it utilizes San Francisco State University's Public Research Institute to audit each and every satisfaction study. At present, some 1,000 California companies have achieved certification in businesses and professions ranging from accountancy and automotive services to health care and real estate lending.

Rated Very High in Customer Satisfaction

Over half of the companies which apply for ValueStar certification fail to achieve the required degree of customer satisfaction.

ValueStar rating information is available on the worldwide web at HYPERLINK http://www.valuestar.com. ValueStar's services have been lauded by consumer advocates including Chris Bjorklund of KGO Radio and Laurel Pallock of the San Francisco District Attorney's Office, host of All Consuming on Bay TV.

Our entire staff takes pride in our acknowledgment by ValueStar. We continue to be committed to delivering superior representation to our clients now and in the future.

FIRM WELCOMES TWO NEW ASSOCIATES

Since our last issue of Focus two bright and capable young associates have joined our firm.

Khaldoun Baghdadi comes to us from Southern California where he practiced with a real estate litigation boutique. While there he had the opportunity to participate as first chair trial counsel in multiple cases.

A 1997 graduate of Hastings College of the Law, Khaldoun was a member of the 1996 Pacific Regional Champion Jessup Moot Court team, ranking third among all oralists in the competition. While at Hastings he also served as managing editor for the International and Comparative Law Review.

Prior to law school, Khaldoun was selected as a University of California undergraduate Fellow, traveling and conducting research on the Middle East peace process in the West Bank and Gaza. In 1995, he served as an intern at the United States Department of State. Fluent in Arabic, and an accomplished cook, Khaldoun is currently working on cases involving employment rights, product liability and premises liability.

Doris Cheng, our other new addition, is a graduate of the University of San Francisco School of Law. Doris, who clerked for our firm in 1997, is a native born San Franciscan. She attended Lowell High School and obtained her undergraduate degree (with honors) at University of California, Davis. Fluent in Chinese, Doris volunteered substantial pro bono time with Equal Rights Advocates, assisting staff attorneys in litigation and in the review of proposed legislation, while at U.S.F.

During her final year of law school, Doris served as an intern to the Honorable Saundra Brown Armstrong in the Northern District Federal Court. Upon graduation from U.S.F., Doris was honored as a Public Interest Law Scholar and also cited as an outstanding participant in the USF Intensive Advocacy Program. Through the advocacy program she was nominated for, and elected to, membership in the USF Inn of Court.

Doris is presently working on cases involving medical negligence, medical product liability and government liability.

Our existing and future clients will be well served by these two new additions to our firm.

SUPREME COURT APPROVES RICO USE IN HMO CASE

Continued from front page

ated discounts with the hospital on its portion of the charges, it ultimately paid less than the 80% it contracted to pay.

The plaintiffs alleged a pattern of fraud violating of RICO, seeking actual, punitive and treble damages.

Humana sought to have the action dismissed on the basis that the McCarran-Ferguson Act was a preempted state law which "invalidates, impairs or supersedes" laws regulating the business of insurance.

The unanimous Supreme Court opinion, authored by Justice Ruth Bader Ginsberg, found that the Nevada statute did not preempt the application of RICO when such application would not "frustrate any declared state policy or interfere with a state's administrative regime."

The McCarran-Ferguson Act is patterned substantially on the National Association of Insurance Commissioners model Unfair Trade Practice Act, a fact which was significant to the Court. The Unfair Trade Practice Act authorizes a private right of action in a number of circumstances, including where an insurer misrepresents to insureds or claimants pertinent facts or policy provisions relating to coverage. The Model Act does not exclude application of other state law, statutory or decisional. Nevada's enactment provided for common law remedies against insurers. Overall, therefore, the Court found no frustration of state policy in permitting a RICO action to go forward. RICO's private right of action and treble damage provisions were found to complement (and in may respects mirror) Nevada's statutory scheme. The Court was also impressed with the fact that the state filed no brief at any time urging that the application of RICO would frustrate its policy or interfere with the state's administrative regime.

HMO immunity from compensatory and punitive damages is also being attacked in California.

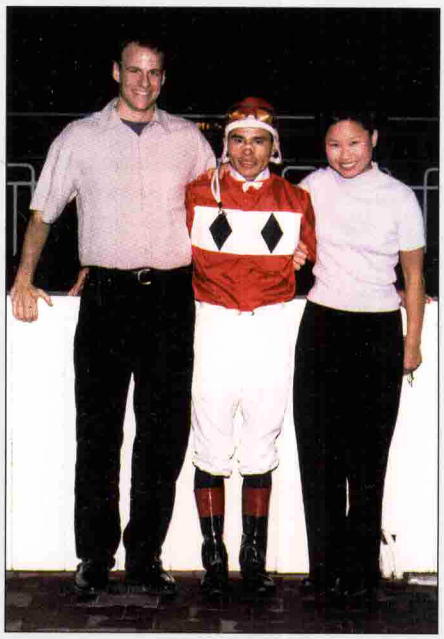
California Insurance Commissioner Chuck Quackenbush recently announced his support for Senate Bill 21, which would permit jurors to hold HMOs liable for their conduct in making treatment decisions; a circumstance which is now prevented both by state law insulating HMOs from liability, and, federal decisions preempting state liability laws where ERISA plans are involved.

As a rule, the provisions of ERISA limit recovery by wronged health plan members to the value of the denied benefit, mandate the application of federal substantive law, and require the plaintiff to show an arbitrary or capricious abuse of discretion in the denial of benefits. ERISA eliminates potential exposure for compensatory or punitive damages.

In addition to SB 21 in California, similar legislation has been offered in Texas and at the federal level. A number of proposals pending in Congress would peel back ERISA protection and allow medical malpractice suits to be brought directly against health plans.

WALKUPDATES

The firm's annual evening at the races was held at Bay Meadows racetrack. Attended by over 200 clients, guests and friends, the evening was enjoyed by all. Pictured below is jockey Jose Arriaga flanked by associates Doug Saeltzer and Doris Cheng. Arriaga rode home Clancy Revere, winner of the Walkup Law Office stakes. Doug and Doris were particularly happy since they had a wager on the winning mount...Dan Kelly recently served as a panelist for The Rutter Group's personal injury update program held in San Francisco and Los Angeles. He also spoke to the Northern California Association of Defense Counsel, as part of a program exploring insurance bad faith issues...Dan Dell'Osso participated as a presenter at Auto Focus '98, a three-day seminar sponsored by the Attorneys Information Exchange Group, an association of counsel specializing in the investigation and prosecution of automobile related product defect claims. Dan spoke on means of effectively utilizing manufacturer-generated product advertising to demonstrate foreseeable product use and defeat defense claims of misuse. Dan has also been elected to the position of First Vice Chair of ATLA's Product Liability Subcommittee...Jeffrey P. Holl was appointed to the Board of Directors of the Lawyers Club of San Francisco's Inn of Court...Michael A. Kelly has been elected a fellow in the International Society of Barristers. The Society's members come from all 50 states as well as Canada, Mexico, New Zealand and Great Britain. Mike has also been invited to participate as an instructor at Emory University's Advanced Trial Techniques Program in the Spring...Rich H. Schoenberger participated as an instructor at NITA's National Advocacy Skills Program held in Boulder, Colorado. Rich was also invited to speak to the Alameda-Contra Costa Trial Lawyers Association on finding and utilizing experts in premises liability cases...Ronald H. Wecht has been elected assistant chair of the BASF section on aviation and space law. In that capacity, Ron addressed a CLE program in November on the topic of Satellites,



Surveillance, Imagery & Privacy discussing privacy issues relating to satellite and surveillance technology...Michael J. Recupero has been selected by the San Francisco Superior Court to participate as an early settlement panelist in the court's Early Settlement Program.

Federal Rule Addressing Child Seat Compatibility in the Works

The National Highway Transportation Safety Administration is shortly expected to propose requirements for a universal child-seat restraint system to minimize compatibility problems that arise between various styles of child restraints and automobile seats. Child-seat makers, and vehicle manufacturers, have been at odds on this issue for some time, leaving parents with the task of determining whether a given child restraint is compatible with their vehicle. With so many makes and models of child-seats on the market, there is no way to insure that all designs will be compatible with the ever-widening range of vehicle seat, seat belt and airbag combinations. Indeed, NHTSA recently admitted that more than 80% of children are improperly restrained because of compatibility problems between the child restraint and the vehicle.

In an effort to eliminate compatibility problems, the new rule will require that vehicles and child-restraints be equipped with a means, independent of vehicle safety belts, for securing child-restraints to vehicle seats.

In its advanced notice of proposed rule making, the agency indicated support for General Motors' uniform child restraint anchorage system (UCRA) because it was relatively inexpensive and utilized familiar hardware. The GM design utilizes two lower anchorages near the seat bottom and an upper tether to anchor the top of the infant seat.

Now that almost all states require children below a specified age or weight to be secured in child seats, it is more important than ever to make certain that consumers can be sure that the child seat they buy will safely fit into their car.

AMENDMENT OF CCP §998 MAKES LITIGATION COSTS RECOVERABLE IN KAISER ARBITRATIONS

Ever since Dickinson v. Kaiser Foundation Hospitals (1980) 112 Cal.App.3d 656, and Woodard v. Southern California Permanente Medical Group (1985) 171 Cal.App.3d 666, Kaiser members have been unable to collect traditional costs of litigation which Superior Court litigants can recoup through the utilization of Code of Civil Procedure §998.

CCP §998, as recently amended, permits a plaintiff to serve on a defendant (or vice versa) a written offer to allow judgment to be taken on specified terms and conditions. The statutory offer can be made anytime until ten days prior to the commencement of trial. A party to a contractual arbitration proceeding (including arbitration of a professional negligence claim against a health care provider, CCP §1295) may now serve another party with a written offer to allow an award to be entered. The offer can be made until ten days prior to arbitration and is deemed withdrawn if not accepted within 30 days, or prior to arbitration, whichever occurs first. CCP §998(b)

CCP §998 creates a strong incentive to settlement because of the monetary penalties which result where a defendant rejects a §998 offer and the plaintiff then obtains a more favorable award. Plaintiff is entitled to 10% interest on the award, calculated from the date of the 998 offer. Such interest continues to accrue until the judgment is satisfied. Civil Code §3291; Steinfeld v Foote-Goldman (1996) 50 Cal.App.4th 1542.

Where the conditions of Civil Code §3291 are met, pre-judgment interest is mandatory.

Whether the pre-judgment interest provisions of Civil Code §3291 also apply to arbitration is not settled. Under Civil Code §3291, where plaintiff makes an offer which the defendant does not accept, the judgment bears interest at the legal rate of 10% per annum. CCP §3291 expressly provides that interest accrues on judgments. When CCP §998 was amended, no corresponding change was made to Civil Code §3291, which continues to refer only to §998 offers in the context of a "trial" and plaintiff's failure to obtain a "more favorable judgment." While it is assumed that the legislative extension of CCP §998 to contractual arbitration was intended to permit §3291 interest to be added to an arbitration award, no reported case has so held.

Airbags Continue To Kill—NHTSA Proposes New Standards

Passenger side airbags, now in a majority of the cars on the road, are estimated to have saved somewhere between 200 and 300 lives between 1993 and 1997, according to the National Highway Transportation Safety Administration. During that same period, it is estimated that such airbags also killed 60 or more children.

The fundamental problem with airbags now in use (a problem denied by manufacturers) is that most passenger side bags are the product of inferior technology. At the time domestic auto makers started installing passenger side airbags, the technology existed to make them safe for everyone, without risking injury or death to small occupants. By choosing not to use safety features which were technologically feasible in the 70's and 80's, auto makers effectively sacrificed children's lives for the sake of profit.

Since the 1970's, American auto makers have had the ability to manufacture so-called "dual deployment bags" which deploy more gently in low speed collisions, and more aggressively in high speed collisions. Electronic safety interlocks (which sense whether or not an adult passenger is seated in the passenger position) have also been available for years. Such systems, however, are expensive. Historically, American auto makers have not wanted to spend money on safety. Indeed, the recent step of placing warning decals in cars concerning the dangers of putting small children in the front seat had to be forced on the manufacturers by the Federal government.

Recognizing that some airbag designs are dangerous, especially for children and small occupants, the National Highway Transportation Safety Administration has

announced a proposed rulemaking that requires auto manufacturers to install airbags designed to avoid such dangers.

This proposed rulemaking, which includes a mandate for more realistic crash tests, will require that airbags protect belted and unbelted occupants of various sizes, and will further require that airbags be configured so as to minimize risk to infants, children and small adults. (Over the last 25 years, the Federal government has only required that an airbag be tested with a dummy the size of an average sized adult male. This has allowed auto manufacturers to install bags which are dangerous to small occupants including women and petite persons.)

Compliance testing under the proposed rules will measure airbag performance using test dummies representing 12-year-old, 6-year-old and 3-year-old children, as well as small females. Full scale crash testing of unbelted occupants will also be a requirement under the proposed standard. NHTSA is also suggesting crash tests which include off-set frontal barrier tests at speeds up to 25 miles per hour so as to better replicate real world collisions. In addition to new dummies, upgraded injury criteria will also be added. The criteria is aimed at evaluating the potential for chest and thoracic injury, as well as neck injury secondary to flexion, extension and shear loading.

At present, no one knows whether (or when) the proposed rule will become effective. In the meantime, millions of Americans continue to be at risk from overly aggressive, poorly designed airbags which have the potential to cause serious and sometimes fatal injuries.

HEALTHCARE LOBBYISTS FIGHT PATIENTS' RIGHTS

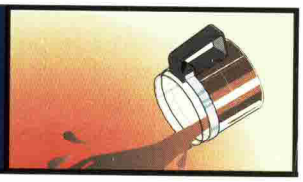
As the newly elected legislature ponders measures to raise the artificial general damage cap of $250,000 applied in medical negligence cases (Civil Code §3333.2), a consortium of health care lobbying groups has lined up to oppose any alteration or increase of the 22 year old cap. The same groups, during the 1997-98 legislative term, blocked passage of a bill which would have raised the $250,000 limit where the victim was under the age of 14, the conduct involved sexual abuse, death or paralysis, or, where the physician in question was under the influence of drugs or alcohol.

The vice president of the California Medical Association, Steve Thompson, was recently quoted in the San Francisco Daily Journal stating that "basically, the data shows there is not a significant enough problem for us to sit down and negotiate" an increase in the general damage cap. Fred Hiestand, general counsel for the newly created "Californians Allied for Patient Protection," an ironically named physicians' lobbying group, has floated the notion that increases in compensation available to victims would reduce healthcare access for poor, low and moderate income people. Desperate to prevent any change in the system of under-compensating malpractice victims, Hiestand' s group has aligned itself with the California Medical Association in trying to convince non-profit clinics, Planned Parenthood, women' s clinics and other providers which serve low and moderate income consumers that a change in the MICRA cap will exacerbate the difficulty the poor find in accessing affordable health care.

None of the proposals presently on the table would raise the MICRA cap to a number which approaches increases in the Consumer Price Index since 1976. Such an adjustment would bring the cap amount to somewhere between $750,000 and $1,000,000.

Recent Cases

Elder Abuse



Edith B. v. Palo Alto Commons

In Edith B. v. Palo Alto Commons, et al. (S.Clara Sup.Ct. No. 766123) Michael A. Kelly negotiated a $900,000 settlement on behalf of a 79-year-old woman burned by scalding coffee in a Palo Alto senior care center. Plaintiff was having dinner in the facility dining room when a deranged co-resident poured a carafe of coffee over her head, resulting in second and third degree burns, skin grafting and inpatient hospitalization.

Plaintiff sought recovery both from the assailant and the facility. Plaintiff alleged the facility had prior notice that the co-resident had a history of alcohol-induced dementia and required close supervision. Plaintiff also sought recovery pursuant to the provisions of California Welfare & Institutions Code §15610.35 (California's elder abuse statute).

The residential care facility defended on the basis that the acts of the co-resident were not foreseeable, and further, were intentional and a superseding cause of any negligence on the part of the facility. Counsel for the resident defended on the basis that she lacked the mental capacity to form the intent necessary for an intentional wrong and was sufficiently impaired that she was incapable of negligence as well.

Medical expenses were $127,000. Both defendants contributed to the funding of the settlement.

Vehicular Negligence

Heirs v. Auto Driver

In Heirs v. Auto Driver (San Mateo Sup.Ct., confidential settlement), Daniel J. Kelly recovered a total of $1,700,000 for the wrongful death and personal injury claims of two women whose Dodge Ram truck was struck head-on by a 1997 Chevrolet Lumina. The defendant driver, who was in the course and scope of her employment with a major corporation, was killed in the collision. The 62-year-old passenger in the plaintiffs' vehicle also sustained fatal injuries.

$1,125,000 of the recovery was apportioned to settlement of the personal injury claim of the 33-year-old driver of the Dodge. She sustained severe orthopedic injuries, which included fractures of her left tibia, right femur, right patella, right ankle and left elbow. Her medical bills totalled roughly $135,000.

The deceased passenger was 62 years of age. She is survived by her husband of 10 years, and three adult children from a prior marriage. The wrongful death case was settled in the amount of $575,000.

DeRyan v. Fulmer

In DeRyan v. Fulmer (S.F.Sup.Ct. No. 990466), Jeffery P. Holl and Daniel Dell'Osso obtained a jury verdict in the amount of $120,000 on behalf of a retired San Francisco high school teacher injured when his Ford Taurus was struck from behind by a late model mini-van. The client testified that the force of impact was 5 miles per hour or less. Little property damage resulted to either vehicle. Plaintiff, then 64 years of age, claimed aggravation of underlying neck and back problems, as well as a right shoulder injury.

Prior to trial plaintiff demanded the available policy limits ($100,000), which defendant's liability carrier refused. No pretrial offer was made. Defendant claimed that the impact was so slight it could not have caused injury. In this respect the defense proffered an anatomist/biomechanical engineer at trial who plaintiffs were able to exclude after an Evidence Code §402 hearing. The jury verdict was returned after a seven day trial. The verdict, including that portion which exceeded the defendant's available policy limits, has been paid.

Medical Negligence

Minor Child v. HMO

In Minor Child v. HMO (confidential settlement), Kevin L. Domecus was able to structure a recovery having a present cash value of $1,175,000 on behalf of the parents of a 6-year-old girl who sustained cerebral palsy from injuries occurring at birth.

Plaintiffs claimed that the HMO provided obstetricians failed to appreciate persistent signs of fetal distress while the expectant mother was in labor and delivery. Plaintiffs' experts testified that a timely Cesarean section should have been performed 45 minutes or more before the treating obstetrician completed a vacuum extraction delivery.

The defendant contended that the obstetrical care which had been provided was entirely appropriate and that no medical indications for an earlier Cesarean delivery were present. The defense also claimed that the child's cerebral palsy was not the result of any insult occurring in utero, but rather was the product of a series of problems which occurred during the four weeks immediately preceding the mother's admission to the hospital. Now six years of age, the minor child suffers from paralysis, cortical blindness and other disabilities. She requires full-time attendant care. The settlement, when combined with available benefits provided by private insurance and government programs, virtually assures that the child's medical needs will be met regardless of her life expectancy.

Ross v. San Francisco General

In Ross v. San Francisco General, et al. (S.F. 975903), plaintiff, age 46, was hearing and speech impaired. On the evening of February 10, 1995, he was jaywalking across the street while intoxicated and was struck by a car, resulting in a hip fracture. During plaintiff's hospitalization, it was noted that he had diminished grip strength. A consulting neurologist concluded that plaintiff was "noncompliant" on his tests, and dismissed his decreased strength complaints. Fourteen days later, after the symptoms had persisted and worsened, an MRI was taken and revealed cord compression and contusion due to

a large ruptured disk. Surgical intervention was delayed another five days. As a result, plaintiff was rendered an incomplete quadriplegic.

Dan Kelly and Paul Melodia settled the automobile portion of the case for the policy limit of $250,000. They then pursued the medical negligence action, resulting in a structured settlement with a present cash value of $1,000,000. As part of the settlement, defendant assumed responsibility for satisfying a Medi-Cal lien of $230,000.

Defendants in the medical negligence action contended that earlier intervention would not have prevented the neurological deficits. It was also contended that surgery could not be done until there was a resolution of the patient's edema, and therefore, the delay was necessary.

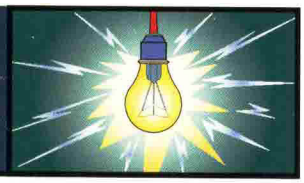
Mrs. D. v. Neurology Group

In Mrs. D. v. Neurology Group (Ala.Co., confidential settlement), Paul V. Melodia and Jeffrey P. Holl negotiated a $750,000 settlement on behalf of a 46-year-old bank employee who suffered an intracerebral bleed with resulting brain damage as a result of an undiagnosed leaking aneurysm. Roughly two months before the catastrophic event, plaintiff had awakened in the night with a persistent headache and sensing that she had lost vision in her right eye. She first consulted an ophthalmologist (who diagnosed optic neuritis) and thereafter an internist. The internist diagnosed "headache" of unknown cause and referred plaintiff to a neurologist. Roughly three weeks later, the neurologist, after a 30 minute examination, concluded that plaintiff had suffered a stroke causing blindness in her right eye. In light of the diagnosis, neither an MRI nor a CT scan was performed.

After returning on three occasions to her internist, about one month after first seeing the neurologist, plaintiff was found semi-comatose in her apartment, having sustained a major cerebral bleed. She was ultimately diagnosed with an aneurysm of the anterior communicating artery. Following surgery at UCSF and intensive rehabilitation, she was able to regain her ability to speak, walk, and other activities of daily living.

The defendants contended that each had acted within the appropriate standard of care, that the differential diagnoses which had been made were reasonable, and, that there were no signs or symptoms of impending stroke. Although plaintiff is permanently disabled, her general damage recovery was capped at $250,000 by the artificial limit of Civil Code §3333.2.

INDUSTRIAL INJURIES



Heirs v. Electrical Contractor

In Heirs v. Electrical Contractor (confidential settlement), Cynthia F. Newton concluded a wrongful death claim on behalf of the surviving parents of a 19-year-old junior college student who was electrocuted while working part-time for a contractor, doing energy efficient lighting retrofitting for a national retailer.

While working in a supply closet hidden from view of the main sales floor, the decedent was killed, either as a result of working with the fixture illuminated, or having an early arriving department store employee turn on the light switch, thereby energizing the circuit he was working on.

The general contractor on the project, and the retailer, both denied responsibility, claiming that all responsibility for safety at the job site had been delegated to the young man's employer.

Plaintiffs claimed that both the general contractor and the retailer retained sufficient control over the work site to support liability, and further, that both were negligent in their selection of the electrical sub-contractor.

The defendants also claimed that the decedent was contributorily negligent for using a metal ladder instead of the non-conducting fiberglass ladder provided by his employer.

The case settled for $500,000 on the eve of trial after three settlement conferences.

Bodestyne v. CCSF

In Bodestyne v. CCSF (S.F. Sup.Ct. No. 983200), Michael J. Recupero negotiated a $210,000 settlement on behalf of a 27-year-old airline ramp serviceman. The plaintiff was injured when the baggage tug he was operating jackknifed on a declining ramp at SFO. Plaintiff's left foot was crushed between his tractor and the first dolly he was pulling.

Plaintiff alleged that the ramp was too slick to permit safe commercial travel. Discovery indicated a history of complaints regarding slippery ramps leading to the underground baggage sorting and unloading stations. There was dispute between the defendant and plaintiff's employer as to who had the obligation of maintaining the ramp.

The worker's compensation lien exceeded $200,000. Defendant CCSF alleged that the incident was entirely the fault of plaintiff's employer. As part of the settlement, a substantial reduction in the worker's compensation lien was negotiated, with a waiver of credit as to future benefits.

Family v. Unidentified Contractor

In Family v. Unidentified Contractor (confidential settlement), Kevin L. Domecus negotiated a cash and annuity settlement on behalf of the family of a sheet metal worker who fell four stories to his death through a defective scaffold railing at a construction site in San Francisco. The present cash value of the settlement was $2,025,000.

The deceased was working as an independent contractor on a re-roofing project at a large private residence. The building, four stories tall, had been entirely scaffolded by a subcontractor co-defendant. On the morning of the accident, the decedent was last seen working near the gutter line of the roof. Moments later co-workers heard a noise, felt the scaffold shake, and observed the decedent falling to the sidewalk.

Plaintiffs contended that the defendants negligently erected and maintained the scaffold, and that the scaffold cross-arms had not been properly secured.

Defendants claimed that irregularities in the erection and maintenance of the scaffold had nothing to do with the accident, as the fall was unwitnessed and there was no direct evidence that the scaffold, or its design/erection, played any part in the tragedy.

The 33-year-old decedent was survived by a wife and two young children. Economic damages were estimated to exceed $1,000,000.

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Recent Cases

Aviation Accidents

Butcher v. Beech Aircraft

In Butcher v. Beech Aircraft (L.A.Sup.Ct. No. NC011297), Ronald H. Wecht settled a wrongful death claim brought by the surviving spouse and child of a 33-year old passenger in a 1965 Beechcraft Bonanza which crashed on takeoff at Long Beach airport.

In the crash, the deceased suffered a fracture at the C-1 vertebra which caused his death nine days later.

Plaintiffs alleged that the aircraft should have been equipped with a shoulder harness for any seated passengers, and that a four-point restraint would have prevented the neck fracture which cost the deceased his life.

Defendant complained that although such harnesses were available in 1965, they were "uncomfortable" and therefore went unused. The defendant also challenged medical causation, claiming that the utilization of a shoulder harness would not have prevented Mr. Butcher's injury.

The case was settled at a mandatory settlement conference for $1,100,000.

Government Liability

Whiteside v. City of Modesto/State of California

In Whiteside v. City of Modesto/State of California (Stanislaus Co.Sup.Ct. No. 113114), Richard H. Schoenberger negotiated a $500,000 settlement on behalf of an 18-year-old motorist severely injured in an intersection collision in Modesto. Plaintiff claimed that the driver of the car which hit him broadside was confused by traffic light configurations at two closely spaced intersections.

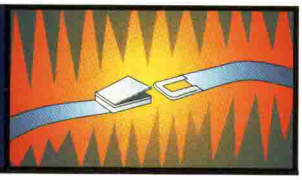
In the intersection where the collision happened, traffic flow was controlled by signals located on each corner. Some 250 feet west of this intersection, a second intersection, on a major thoroughfare with a posted speed limit of 35 miles per hour, was controlled by lights visible to drivers approaching the accident site. Despite the proximity of the two intersections, their signals were not coordinated to insure that cars traveling through one would have a green light at the next. (Had the intersection light timing sequence been so coordinated, the subject collision would never have occurred.)

Plaintiff suffered a mild brain injury and fractures to his jaw, hip and femur.

The public entities alleged that both intersections were in conformance with the all governing traffic manuals and state regulations, and that the sole and exclusive cause of the accident was the defendant driver who failed to appreciate that the lights he thought were green were actually for an intersection east of the place where the accident happened.

The matter was resolved on the eve of trial after all expert discovery had been concluded.

Product Liability



Diane H. v. Domestic Auto Maker

In Diane H. v. Domestic Auto Maker (USDC Nor. confidential settlement) Michael A. Kelly and Daniel Dell'Osso concluded a wrongful death/product liability claim on behalf of the wife and three children of a 42-year-old carpenter killed in a three car collision in Sonoma County.

The decedent was operating the family's 1991 compact station wagon when it was rear-ended and thrust into a lane of oncoming traffic. He was wearing the motorized (passive) shoulder harness but not the manual lap belt with which the vehicle was equipped. Per governing motor vehicle safety standards, the motorized passive system was required to work equally as well whether or not the manual lap belt was fastened.

In the second (frontal) collision, the decedent sustained a fatal head injury. Plaintiffs claimed the head injury was the result of defects in the vehicle's restraint system which was inadequate to prevent head impact with the forward structures in the passenger compartment absent lap belt utilization. The manufacturer claimed that it was aware of no similar incidents, that the occurrence was a "freak accident" and that the speeds and impact forces involved were sufficiently great that no restraint system (short of an airbag) could have protected against fatal injury.

Plaintiffs' experts determined that a rear-end collision forced an occupant who was not lap-belted rearward and up in his seat, causing the shoulder harness to slide out of position and rotate around the wearer, so as to fail to provide any restraint in a subsequent frontal impact.

We are available for association and/or referral in all types of personal injury matters. Fees are shared with referring counsel in accord with Rule of Professional Conduct 2-200. Additionally. if there is a particular subject you would like to see discussed in future issues of ***Focus on Torts*** please contact Michael Kelly or Lisa LaRue.

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